

June 3, 2009

**CONFIDENTIAL**

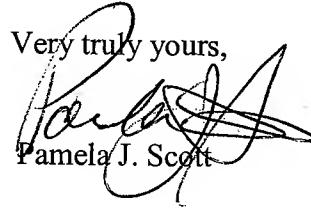
**VIA FEDERAL EXPRESS**

Alan B. Levin  
Director  
Delaware Economic Development Office  
99 Kings Highway  
Dover, DE 19901

Dear Alan:

Enclosed please find a memorandum I have prepared as a follow up to our meeting concerning the Stoltz projects. The memo ended up being a bit longer than I intended, but I thought it was helpful to provide the appropriate background and reference for the issues presented. I consider the information contained within the attached memo to be confidential, for your use only, and would not want it to be circulated or in any way considered a public document.

Thank you again for your assistance. Should you have any questions, please do not hesitate to contact me.

Very truly yours,  
  
Pamela J. Scott

Enclosures

cc: Mr. Brad Coburn

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DELAWARE MARYLAND NEW JERSEY NEW YORK PENNSYLVANIA WASHINGTON, DC

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## CONFIDENTIAL MEMORANDUM

To: Alan B. Levin  
Director, Delaware Economic Development Office

From: Pamela J. Scott

Date: June 3, 2009

Subject: Stoltz Projects

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As a follow up to our meeting concerning the Stoltz Projects, below is a summary of the issues relative to State and County approvals affecting these projects.

### **Barley Mill Plaza**

This project proposes to redevelop the former DuPont Barley Mill Complex by demolishing the buildings currently existing (approximately 1.1 million square feet) and developing 2.8 million square feet of commercial, residential and office space as a mixed use community. The property is 96 acres in size and zoned "OR", Office Regional. The issues of concern for this project are as follows:

- DelDOT needs to stay the course in terms of the level of traffic analysis that they are requiring for this project. They have requested a Traffic Operational Analysis ("TOA") rather than a Traffic Impact Study ("TIS"), which is consistent with the standards established for redevelopment projects. A request has been made by community leaders and state legislators to require a TIS rather than a TOA, probably because of the belief that the standards for a TIS cannot be met for this project. We do not believe that a TIS is warranted and to require same would set a dangerous precedent for redevelopment projects. Therefore, we need to ensure that DelDOT refrains from changing their position on this matter.
- It has been suggested by community leaders and legislators that DelDOT should require that Level of Service ("LOS") "D"<sup>1</sup> be maintained for those intersections impacted by the proposed development. In connection with a TOA, neither DelDOT nor the County have the authority to require that the impacted intersections for this project meet the established traffic LOS standards. This project is exempted from the DelDOT LOS "D" standards because it is grandfathered, and the County does not have the authority to apply LOS "D" to redevelopment projects.<sup>2</sup> DelDOT is required to ensure that the roads will operate safely and permit the smooth flow of traffic once the project is developed. Since Stoltz is proposing the redevelopment of an

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<sup>1</sup> "Level of Service" is a measurement of the seconds of delay per vehicle sitting at a signalized intersection. The standard established by DelDOT is LOS "D" which is anywhere between 15 and 40 seconds of delay per vehicle at the intersection.

<sup>2</sup> Despite the legal requirements, per a letter from Secretary Carol Ann Wicks dated May 19, 2009 which I received today (copy attached), it would seem that DelDOT still intends to ensure that LOS "D" is the standard for this project.

infill parcel, we believe that the standard for review of the impact of this project on the intersections should be that they will operate no worse than without the proposed development. In other words, we cannot further degrade the efficiency of the intersections as a result of the proposed development.

- DelDOT has recently requested that the intersection at the Tyler McConnell Bridge and the entrance to the DuPont Experimental Station be included in the TOA. This request goes beyond the original scope of the TOA established by the County and DelDOT. It also goes beyond the standard policy of requiring the review of “three (3) intersections out in all directions from the point of access of the proposed project”. This intersection has been the subject of a significant amount of study by DelDOT over the years due to operational inefficiencies. The only known fix is to construct another bridge or widen the existing bridge. Neither the expansion of the DuPont Experimental Station nor the development of the AstraZeneca project are tied to these improvements even though these developments probably have the most immediate impact on the operation of the intersection. Including this intersection in the TOA goes beyond the authority granted to DelDOT and simply gives the opposition another basis for attempting to stop the project.
- New Castle County has taken the position that when construction of the project begins, the different uses (residential, office and commercial) must be built proportionately. This is not a requirement of the County Code, but, rather, an “interpretation” of the Code requirements by the County Land Use Department. With a project of this size, such a requirement would impose an unreasonable burden on the developer by jeopardizing their ability to finance the project and requiring that space be built before there is a tenant for it.
- Time is running out. The County requires that each step of the land development process be completed within a set timeframe. Stoltz is required to submit a Record Plan to the County for this Project no later than 12/19/09 or the plan will expire. Stoltz has lost a lot of time trying to work with the community on a plan that they will accept. As a result, a lot of remains to be done in the next six (6) months to meet this deadline, including completion of the TOA and then review by DelDOT. If the deadline is missed it will be a significant setback for this project.

### **Greenville Center**

This project involves the addition of 27 residential units and 22,235 square feet of retail space, to an existing developed site consisting of 138,770 square feet of retail and office space. The property is 10.5 acres in size and zoned “CR”, Commercial Regional. The issues of concern are:

- As with the Barley Mill Project, DelDOT needs to stay the course and not change the rules in the middle of the game. The project is not a redevelopment project, therefore, a full TIS is being performed and LOS “D” must be met for impacted intersections. The community in its zeal to oppose the project, has retained their own traffic engineer who seems inclined to want to perform its own TIS for the Stoltz project. DelDOT needs to be clear that only the applicant performs the TIS and other analysis related to traffic. The general public has a right to offer comments but DelDOT should not accept separate studies performed by the community’s consultant.

- The Buck Road access seems to be a point of contention for certain members of the community. This access has been in place for many years and operates efficiently. While DelDOT has the right to review the entrance in connection with the development proposed, the additional traffic created by the additional square footage will be minuscule and should not be the basis for any wholesale changes to the entrance.
- The neighbors have complained about internal traffic circulation at the site and want either DelDOT or the County to do something about it. While the County has the authority to review internal circulation, DelDOT has no such authority. The internal circulation is not changing from what was approved when the grocery store was added to the site several years ago. The traffic engineer for the community has suggested that the way to fix the perceived problem is to demolish buildings and start over. Considering that Stoltz has a fully leased facility, that proposal makes no economic sense.
- Time is running out. As stated previously, the County requires that each step of the land development process be completed within a set timeframe. Stoltz is required to submit a Record Plan to the County for this project no later than 10/23/09 or the plan will expire. Stoltz has lost a lot of time trying to work with the community on an acceptable plan, but to no avail. Any attempts to further refine the project now, will cause Stoltz to miss the County deadline which would be a significant setback for this project.

### **Shops at Brandywine**

Development is proposed for the 42 acre parcel of land owned by Woodlawn Trustees, located at the intersection of Rt. 202/Beaver Valley Road/Naamans Road. The majority of the property is zoned "ST", Suburban Transition, with a small piece being zoned "CR". This is literally the last piece of non-commercially zoned property on Rt. 202 between Rt. 141 and Naamans Road. The development proposed is a mixed use project of 445,800 square feet of residential and commercial space with a Whole Foods grocery store as an anchor tenant. We understand that Christiana Care is interested in this property and Stoltz may have the ability to work out a joint development project with them. The issues of concern for this project are:

- In order for any non-residential project to proceed at this site, the property needs to be rezoned. In the event that the County Land Use Department does not support the proposed rezoning, a supermajority vote is required for the rezoning, i.e., 9 out of 13 Councilmembers must vote in favor of the application. A rezoning of the property to "CR" would be consistent with the County's Comprehensive Plan.
- The project also needs to comply with the Level of Service standards. The intersection of Rt. 202/Beaver Valley Road/Naamans Road, currently operates at LOS "F" and there is no acceptable fix. In that event, the only way to proceed forward may be with a request for a Level of Service Waiver through New Castle County Council. With Christiana Care as part of the project this may be feasible but obviously it is not without risk.
- The current plan for the project will expire on 10/22/09 if a Record Plan is not submitted to the County by that time. Stoltz will not be able to meet this deadline, however, it is prepared to start over as it has not progressed very far in the land use process.

## **20 Montchanin**

This project involves the addition of a separate 36,500 square foot medical office building to the site which currently contains a 134,889 square foot office building. The only approvals needed to proceed, in addition to a minor land development plan, are the amendment of a set of deed restrictions which restrict the erection of a “separate” building on the property. The issues are:

- To date the Kennett Pike Association and Hagley Museum have claimed that in order for the deed restrictions to be amended, these organizations need to consent. The deed restrictions, by our read, do not require their consent. However, Stoltz has made changes to the project to address the concerns of the community and would like to move forward with the project as revised. The belief is that the community wants to hold this project hostage until Stoltz agrees to their demands concerning the Greenville Center project by eliminating the 12 story residential building.
- The project will expire on 10/28/09 if a Record Plan is not submitted to the County by that time. As with the Shops at Brandywine project, this project has not progressed far enough in the process for this to be a significant set back for Stoltz.

### **General**

We discussed, very generally, concerns about the deadlines in the County Code for obtaining approvals of development projects. This concern is not limited to the Stoltz projects as it is an issue for many development projects that have stalled due to current economic conditions. Generally speaking, the major plan approval process involves three steps, Exploratory, Preliminary and Record. The applicant has one year from the date of review of the Exploratory Plan to submit the Preliminary Plan, and one year from the date of review of the Preliminary Plan to submit the Record Plan. Once the Record Plan is submitted, the applicant has 18 months to obtain approval. The County Department of Land Use can grant two (2) ninety (90) day extensions for the submission of both the Preliminary Plan and the Record Plan based upon “circumstances beyond the control of the applicant”. While 18 months may seem like a lot of time to obtain these approvals, it often is not due to the number of items that need to be addressed and finalized. It would be helpful if legislation were pursued that would grant a wholesale extension of time in order to complete the approvals process. The extension should be for at least one year and could be limited to plans submitted during a specific timeframe. Such action has recently been taken in three (3) other jurisdictions, Portland, Oregon, the State of New Jersey and the State of Florida. Summaries of the actions taken by these jurisdictions are outlined below:

#### **State of New Jersey: Permit Extension Act of 2008**

On September 6, 2008, the Governor of the State of New Jersey signed into law the Permit Extension Act of 2008 (“PEA”).

The legislature declared that the reason the Act was passed was because there “exists a state of national recession, which has drastically affected various segments of the New Jersey

economy. As a result of the crisis in the real estate finance sector of the economy, real estate developers and redevelopers, including homebuilders, and commercial, office, and industrial developers, have experienced an industry-wide decline, including reduced demand, cancelled orders, declining sales and rentals, price reductions, increased inventory, fewer buyers who qualify to purchase homes, layoffs, and scaled back growth plans. The construction industry and related trades are sustaining severe economic losses, and the lapsing of government development approvals would, if not addressed, exacerbate those losses.”

The PEA declares that the expiration date of an approval that would otherwise expire during the “extension period” of Jan. 1, 2007 through July 1, 2010 is stayed until July 1, 2010. After July 1, 2010, the PEA shall not extend any approval more than six months beyond the conclusion of the extension period (December 1, 2010). For example, under the PEA a permit with an expiration date of March 31, 2007 (i.e., with three months remaining on the permit as of January 1, 2007) would be extended until October 1, 2010 (or until three months after July 1, 2010). As another example, under the PEA a permit with an expiration date of July 1, 2008 (i.e., with 18 months remaining on the permit as of January 1, 2007) would be extended until December 31, 2010 (i.e., the permit would only be extended for six months after July 1, 2010 and would not be extended for 18 months after July 1, 2010).

The Act does have certain exclusions including any permits issued within an “Environmentally sensitive area” or “Flood Hazard Area.” The act shall not toll any approval issued under the "Municipal Land Use Law," in connection with an application for development involving a residential use where, subsequent to the expiration of the permit but prior to January 1, 2007, an amendment has been adopted to the master plan and the zoning ordinance to rezone the property to industrial or commercial use when the permit was issued for residential use.

### **Portland City, Oregon- Zoning Code Amendment**

On Wednesday afternoon, May 20th, 2009, Portland County City Council adopted a Zoning Code amendment proposed by the Bureau of Development Services that extends for a limited period the expiration date for land use approvals and related actions. The amendment goes into effect May 27, 2009. The amendment extends the expiration/void periods for the following actions: 1) Land Use Decisions; 2) Pre-Application Conferences; and 3) Final Plat applications. The following summary table identifies the timelines affected by the amendment, and the length of the different extensions.

Action	Date of Action	New Expiration Date
<b>Land Use Decisions</b>	For decisions that became effective between 5/27/06 and 12/31/08	Building permit must be issued by 6/30/12
<b>Preliminary Plans</b>	For decisions that became effective between 5/27/06 and 12/31/08	Final Plat application must be submitted by 6/30/12
<b>Pre-Application Conferences</b>	For conferences held between 4/1/07 and 12/31/08	Conference valid until 12/31/10
	For conferences held between 1/1/09 and 12/31/09	Conference valid for two years from date conference held
<b>Final Plat Applications</b>	For Final Plat applications submitted prior to 12/31/09	Application voided if no activity for 365 days

Under the past code, developers who did not obtain a building permit within three years of receiving approval of their land-use reviews had to go through the process again. That process can cost \$15,000 to \$20,000 in city fees and more than \$100,000 when added to the cost of hiring consultants and writing studies. The Amendment is intended to help developers whose land-use approvals were issued between April 2006 and December 2008.

#### **State of Florida: Senate Bill 360**

A growth management bill supported by Florida's business and development interests but opposed by environmentalists and local governments became law with Governor Charlie Crist's signature Monday, June 2, 2009. The law included a clause extending permit expiration for two years.

In recognition of 2009 real estate market conditions, any permit issued by the Department of Environmental Protection or water management district and any local government development order (including DRI development orders), or building permit that has an expiration date of September 1, 2008 through January 1, 2012, will be extended and renewed for a period of two years following its date of expiration. Permits that are extended will continue to be governed under the rules in effect at the time the permit was issued.

The holder of a valid permit eligible for the two year extension must notify the authorizing agency in writing by December 31, 2009 and identify the authorization for the extension. The extension does not apply to: (1) any permit issued by the Army Corps of Engineers; (2) a permit determined to be in significant noncompliance with the conditions of the permit or authorization as established by the issuance of a warning letter, notice of violation, formal enforcement action or other equivalent action; or (3) a permit that, if granted an extension, would delay or prevent compliance with a court order.

## **Conclusion**

In order to move forward with these development projects, Stoltz needs to ensure that both DelDOT and the County follow the established processes and not change the rules of the game. Specifically, with respect to Barley Mill, the project is exempt from the LOS "D" standard so we need to come to some resolution with DelDOT as to the appropriate standard to be applied for analyzing traffic. As the redevelopment of an infill parcel, the standards for measuring the traffic impact for this project should be focused on not making the situation any worse rather than on trying to fix problems that have existed for some time and go well beyond the impact of this project. Equally as important is adopting legislation to extend the timeframes for approvals of development projects to provide relief to developers during very difficult economic times.

I look forward to your feedback.

## **Attachment**



STATE OF DELAWARE  
**DEPARTMENT OF TRANSPORTATION**  
800 BAY ROAD  
P.O. Box 778  
DOVER, DELAWARE 19903

CAROLANN WICKS, P.E.  
SECRETARY

May 19, 2009

The Honorable Michael S. Katz  
The Honorable Gerald Brady  
The Honorable Deborah Hudson  
Legislative Hall  
Dover, Delaware 19901

Dear Senator Katz, Representatives Brady and Hudson:

**Re: Pending Development Plans for Barley Mill Plaza**

Thank you for the extensive encouragement and recommendations conveyed by your letter. The development proposals to which your letter is addressed are certainly controversial. I will try to address the issues you raise with regard to Barley Mill Plaza first and then the issues you raise regarding the Greenville Center second.

The traffic analysis that is being done for Barley Mill Plaza is using Level-of-Service "D" (LOS D) as the benchmark. Although the Department's current regulatory standard is LOS D this particular development proposal was "grandfathered" and therefore not subject to the state's LOS D standard. We believe we will need to follow the county's lead in recognizing that this is a redevelopment project where special rules apply. We still intend to provide advice to the County in terms of the transportation system improvements they should be requiring in order to achieve LOS D. We will be happy to work with them to make suggestions regarding how to meet that standard including modifications to the mix and intensity of uses being proposed if the analysis indicates that such modifications may be appropriate.

The situation at Greenville Center is a little different in that it has been brought to our attention that the movement of Janssen's Market to the Center appears to have created a problem that may need to be addressed regardless of how or whether the proposed modifications are pursued. Some of my colleagues are working to develop a solution to address this existing problem. At this point it does not appear to be the case that additional land would need to be acquired from surrounding properties, but we are in the initial stages of our analysis.



Beyond this existing problem we will be interested to learn from the Traffic Impact Study how much additional traffic might be generated by the proposal. We will be advising the County Land Use Department regarding the type and extent of transportation system improvements that we believe are needed to meet the County concurrency requirements. This proposal was also “grandfathered” and as such is not subject to our LOS D standards. As we learn more from the analysis we will gladly share what we discover with you if you wish. My staff will arrange a meeting with you to present and discuss the information we are developing regarding the current issues at the Greenville Center.

Sincerely,



Carolann Wicks  
Secretary

CAW:rrp

cc: Robert S. Weiner, Councilman, Council District 2  
Mark Chura, Citizens for Responsible Growth, New Castle County  
Christopher A. Coons, County Executive, New Castle County  
David M. Culver, General Manager, NCC Land Use Department  
Derrick S. Kennedy, PTP, Senior Project Manager, Orth-Rodgers & Associates, Inc.  
Pam Scott, Legal Counsel for the Stoltz organization ✓  
Natalie Barnhart, Chief Engineer/Director of Transportation Solutions  
Ralph Reeb, Director, Planning  
Don Weber, Assistant Director, Chief Traffic Engineer  
Theodore Bishop, Assistant Director, Development Coordination, Planning  
T. William Brockenbrough, County Coordinator, Planning  
Marc Coté, Subdivision Engineer, Planning